

No. 83-1950

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

MARY JEAN McALLISTER and
JUDITH E. KLINE, D.O.,
Petitioners,
v.

GULF FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

Petition for Writ of Certiorari to the District Court
of Appeal of Florida for the Second District

PETITIONERS' REPLY BRIEF

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Respondent first asserts that Petitioners' record references were required by Supreme Court Rule 21 to be reproduced in the Appendix. Rule 21 contains no such requirement, and Petitioners are unable to perceive the basis for Respondent's assertion.

Respondent's argument—that this case does not raise the question before the Court—misstates the lower court's opinion and the reasoning applied therein. Contrary to Respondent's assertion (brief in opposition at 4), the lower court did not find that the loan denial was due to an income-to-debt ratio in excess of 33%. Contrary to Respondent's claims (brief in opposition at 2 and 4), the lower court made no specific finding or holding that

Respondent, as a matter of policy, performs a combined analysis for unmarried coapplicants. Rather than note Respondent's other misstatements, Petitioners refer this Court to the judgment and opinion of the lower court which is appended in full to the petition for writ of certiorari (App. B).

It is the lower court's holdings which present the question before this Court. The lower court held that the Bank (due to Petitioners' marital status) failed to analyze their application on a combined basis, contrary to the Equal Credit Opportunity Act, and held that, had the Bank combined Petitioners' finances, their 47% combined income-to-debt ratio would have been within the Bank's 33% to 50% income-to-debt ratio limit in which the Bank previously made loans (App. 8a-9a). The Bank's denial of Petitioners' loan was based in substantial part upon an impermissible factor because, by failing to aggregate Petitioners' finances, Petitioners were left with individual ratios over 50%, *outside the range of the Bank's consideration*.¹ The material issue, *as held by the court*, is whether Petitioners would have qualified for the loan absent Respondent's illegal conduct (App. 8a) :

"The material issue here is whether Plaintiffs were denied credit because the Defendants failed to aggregate their financial data thus bringing Plaintiffs into a position of meeting Gulf Federal guidelines for a loan, as required by E.C.O.A. and this failure was the cause because Plaintiffs would otherwise have qualified."

¹ In an analogous situation, the plaintiff, in *Smallwood v. United Airlines*, — F.2d —, 34 FEP Cases 217 (4th Cir. February 28, 1984), showed that defendant failed to consider his employment application because his age was outside of defendant's upper limit. The court, relying on *Mount Healthy*, placed upon the defendant the burden of proving it would not have hired plaintiff had it considered his application.

Contrary to the *Mount Healthy* analysis allocating burden of proof, the lower court placed upon Petitioners the burden of proving this material issue (App. 9a) :

"Petitioners have the burden of showing what the eligibility for a loan above 33% income-to-debt ratio would be. . . The Court finds, this must be established before Plaintiffs can say they were entitled to a loan with an income-to-debt ratio under a combined analysis of 47%. . . . The court interprets the legal obligation to combine an analysis under E.C.O.A. to mean that if a person can show they would be entitled to a loan when their finances are combined . . . then the failure [to obtain a loan] would result from discrimination and not other factors." Emphasis added.

Finally, Respondent's reliance on *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), and progeny, is misplaced here. The method or formula for proving discrimination becomes irrelevant once the court finds that discrimination has occurred. The burden should then shift to the defendant to prove (either as an affirmative defense to violation, or as an avoidance of remedy), that the act complained of would have taken place absent defendant's illegal conduct.

CONCLUSION

For the reasons previously submitted, and for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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